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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1203

UNITED STATES OF AMERICA,
Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinions Below

The judgments which the petitioner now asks the Court to review were rendered in favor of the respondent ("Prudential") by the United States Court of Claims in seven consolidated suits for refund of federal income tax for the years 1950 through 1956. The opinion is reported at 337 F.2d 651 (1964) (herein "the second *Prudential* case").

Judgment by the same Court for Prudential in a prior case involving the same issue for 1949 is reported at 319 F.2d 161 (1963) ("the first *Prudential* case"). No petition was filed in that case either for rehearing or for a writ of certiorari and the amount of that judgment has been paid.

By petition filed March 13, 1967 (No. 1144, this Term), petitioner is also seeking review of a decision by the Court of Claims in favor of The Equitable Life Assurance Society

of the United States ("Equitable") involving the identical issue for the years 1950 through 1955. That decision is reported at 366 F.2d 967 (1966) ("the *Equitable* case").

Jurisdiction

On October 16, 1964, the Court of Claims in this case granted Prudential's motion for partial summary judgment that it was entitled to recover on the foreign tax credit issue, the sole issue involved in this petition for certiorari. No petition for rehearing or for writ of certiorari was filed at that time. After trial and subsequent settlement of all other issues, the Court of Claims on December 2, 1966, pursuant to stipulation of the parties, entered judgments as to the amounts to be recovered (Petition, p. 12). No petition for rehearing was filed. The petition for writ of certiorari was filed on March 30, 1967.

Statutes and Regulations Involved

Section 131(a) of the 1939 Code and section 901 of the 1954 Code[1] each allow a credit against United States federal income tax for foreign "income, war profits, and excess profits taxes".

Section 131(h) of the 1939 Code and section 903 of the 1954 Code provide that "the term 'income, war profits, and excess profits taxes' shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country. . . ."

Section 205 of the 1939 Code and section 841 of the 1954 Code provide that domestic insurance companies are

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[1] The Internal Revenue Code of 1939, as amended, governs the plaintiff's Federal income tax liability for the years 1950 through 1953. The Internal Revenue Code of 1954, as amended, applies to the years 1954 through 1956. The provisions of the two Codes relevant to the issue involved are substantially identical.

entitled to credits for foreign taxes to the same extent as other domestic corporations.

Section 29.131-2 of the Treas. Reg. 111 (applicable in 1950 and 1951)[2] provides in part as follows:

> "* * * the term 'income, war-profits, and excess-profits taxes' includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if
>
> (a) such country or possession has in force a general income tax law,
>
> (b) the taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and
>
> (c) such general income tax is not imposed upon the taxpayer thus subject to such substituted tax."

Question Presented

Whether, as the Court of Claims held, Prudential was entitled to a credit for Canadian premiums taxes under the provisions of the Internal Revenue Code that allow a credit for foreign income taxes and taxes paid in lieu of income taxes otherwise generally imposed.

Statement of the Case

Prudential is, and was during each of the years involved, a mutual life insurance company incorporated in the State

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[2] Substantially identical provisions were contained in section 39.131(h)-1(b) of Tres. Reg. 118 (applicable in 1952 and 1953) and section 1.903-1(a) of Treas. Reg. (1954 Code) (applicable in 1954 and subsequent years).

of New Jersey and doing business in the United States and Canada.

With respect to premiums received from the Province of Ontario, Prudential paid premiums taxes for 1950 and 1951 to Ontario. With respect to premiums received from Quebec, Prudential paid premiums taxes for 1950 through 1956 to Quebec. With respect to premiums received from the other Provinces, as a result of so-called Tax Rental Agreements between such provinces and the Dominion, Prudential paid premium taxes for 1950 through 1956 to the Dominion.[3] Each of the three jurisdictions to which Prudential paid premium taxes also imposed a tax on the net income of corporations generally. Each of the three jurisdictions specifically exempted mutual life insurance companies from the general corporate income tax.

Under section 14(1) of The Corporations Tax Act of Ontario (Rev. Stat. of Ont. 1950, c. 72, as amended)[4] a net income tax was imposed on "every incorporated company" with an office, assets or business in Ontario, except "as in this section otherwise provided". Section 14(3) of the same Act provided:

> "(3) The tax imposed under this section shall not be imposed on any incorporated company,
>
> . . . . . .
>
> "(i) that pays taxes under this Act as a[n] . . . insurance company . . ."

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[3] Under the Tax Rental Agreements, the "renting" provinces agreed to suspend certain taxes, including their premiums taxes and corporation income taxes, in return for compensation by the Dominion. Ontario joined the renting provinces for 1952 through 1956.

[4] The texts of relevant provisions of the statutes of Ontario, Quebec, and the Dominion of Canada, as in effect in each of the years in question, are attached as exhibits to the petitions filed by respondent in the Court of Claims to initiate these actions.

The only tax payable under this act by insurance companies was imposed by Section 4(1) and (2) which provided that every insurance company should pay a tax of 2% calculated upon the gross premiums received during the fiscal year from Ontario.

The Quebec statute differed from that of Ontario in form only. Section 6 of the Quebec Corporation Tax Act (11 Geo. 6, c. 33 (1947)) imposed a tax of 7% on the net income of

> "... every company, partnership or person contemplated by subdivisions 1, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, 17, 18 and 19 of section 3, ..."

Subdivision 1 of Section 3 of the Act applied to

> "... every incorporated company ... not otherwise specially taxed under the following subdivisions of this section 3."

Subdivision 3 of Section 3 imposed

> "In the case of every insurance company, a tax of two percentum on every premium received by the company ... in Quebec."

The Dominion of Canada, by section 36 of The Income Tax Act (11-12 Geo. 6, c. 52 (1948), as amended), imposed a tax on the net income of corporations generally. This Income tax would have applied to Prudential were it not for the specific provision of section 29 of the Act which exempted from tax the income of life insurance companies except for

> "... the aggregate of the amounts credited to shareholders' account or otherwise appropriated for or on account of shareholders during the year ..."

Mutual life insurance companies like the respondent, having no shareholders, were thus exempt from the income tax.

They were, however, subject to a 2% premiums tax imposed by section 14(1) of the Dominion Excise Tax Act (Rev. Stat. of Can. 1927, c. 179, as amended). A credit was provided against the Dominion premiums tax for premiums taxes paid to non-renting provinces.

As stated in greater detail in Equitable's brief in No. 1144, pp. 4-5, the Dominion premiums tax as applied to life insurance companies was first imposed in 1941. It derives from the provincial premiums taxes that were all suspended during the war along with all provincial corporate income taxes pursuant to what were first known as the Wartime Tax Agreements. Prior to these agreements with the provinces, mutual life insurance companies were not subject to tax at the Dominion level on either their life insurance premiums or their income.

Reasons Why the Petition Should Be Denied

Neither the petition in the *Equitable* case (No. 1144) nor the petition here discloses any grounds for review by this Court of either of the two Court of Claims decisions. Respondent urges that none exists. The correctness of the result is evident from the opinions below. The respondent is vigorously opposed to the petitioner's suggestion (p. 4) that final disposition of this case should be further delayed.

1. In its overly zealous efforts to find a question of law to present for review, petitioner has again, as in No. 1144, misstated the basis of the Court of Claims decisions. According to petitioner, the question is whether a "mere" showing of exemption from income tax is sufficient to qualify the premiums tax as one paid "in lieu of" the income tax. (Petition here, p. 3; Petition in No. 1144, pp. 6, 8, 10). As demonstrated in Equitable's brief in opposition in No.

1144,[5] it is perfectly obvious from reading the two opinions below that no such question exists in these cases. Neither Prudential nor Equitable has ever argued for the proposition complained of nor was it adopted or relied on by the Court of Claims.

Petitioner points to no real controversy either as to the plain meaning of the foreign tax credit provisions of the Internal Revenue Code or as to the propriety of applying the tests specified in the Government's own regulations. Three times the Court of Claims has carefully examined all of petitioner's evidence, read its briefs and listened to its oral arguments. Three times it has unanimously found that a close connection did exist between the income tax exemptions and the premiums tax liabilities and that the premiums taxes paid by Prudential and Equitable were, therefore, indeed paid in lieu of the income taxes otherwise generally imposed by the taxing jurisdictions.

Thus, in reality, all petitioner seeks here is another review of the facts. Not content with the three "days in court" it has already had, petitioner would have this Court review the voluminous documentary exhibits and hundreds of pages of testimony relating to income, premiums and other taxes applicable to an unrelated variety of categories of taxpayers in the Dominion and all of its Provinces over a half a century, in the fond hope that this material, which failed to convince a single one of the seven Court of Claims judges that have considered it, will be found by this Court to compel a conclusion that the premiums tax liabilities and income tax exemptions were unconnected.

2. In its *Equitable* petition (No. 1144, p. 10, n. 7), petitioner concedes the lack of conflict among the decided cases.

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[5] Prudential concurs in the reasons advanced by Equitable for denying the writ.

The footnote itself reveals that petitioner's failure to obtain a conflict is not for lack of effort or opportunity but for lack of merit. It complains that unless the writ is granted, it will not be able to litigate this issue any more. Disappointing as this may be to the petitioner, surely it is not undesirable that there be some limit on the number of times the Government can force taxpayers to try and retry this issue, particularly where petitioner's repeated efforts have been universally unsuccessful.

3. Prudential respectfully submits that the correctness of the result in the *Prudential* and *Equitable* cases is fully apparent from the text of the lower court's opinions. As Judge Durfee points out in *Equitable* (Petition in No. 1144, p. 25), allowance of credit for the Canadian taxes in question will fulfill the precise purpose for which the foreign tax credit provisions were enacted. There has never been any doubt or controversy about the purpose of these provisions.[6] As the holdings of the Court of Claims are strictly limited to the taxes paid by mutual life insurance companies in the years and jurisdictions in question, petitioner's characterization of the result as the creation of a loophole is totally unjustified.[7]

4. It would be most inappropriate not to dispose of this case at the same time as No. 1144. Judgment on Prudential's right to recover here was entered October 16, 1964.[8]

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[6] *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1 (1932); Report of the Senate Committee on Finance on the Revenue Act of 1942, S. Rep. No. 1631, 77th Cong., 2d Sess. 131-132 (1942), 1942-2 C.B. 504, 602.

[7] Revenues are protected against excessive foreign tax credits by statutory limits provided in section 131(b) (1939 Code) and section 904 (1954 Code). Congressional reliance on these limits is evident in S. Rep. No. 1631, *supra*, n. 6.

[8] The timeliness of the petition here is debatable but the Court appears to have resolved this point in petitioner's favor in *United States* v. *Carlo Bianchi & Co.*, 371 U.S. 939 (1962).

Though all other issues were settled by agreement accepted July 15, 1966, entry of final judgment was deferred at petitioner's request until the Court of Claims could hear the *Equitable* case. Further postponement of final disposition of this case is surely unwarranted.

Conclusion

Prudential urges that the Prudential and Equitable petitions should both be denied without delay and that, in no event, should the cases be disposed of other than concurrently.

Respectfully submitted,

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